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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992,	)	MM Docket 92-266
	)	
Rate Regulation	)	
	)	
Fifth Notice of Proposed Rulemaking	)	

COMMENTS OF TELE-COMMUNICATIONS, INC.

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APPENDICES

SUMMARY

GOING-FORWARD METHODOLOGY

The current going forward rules provide insufficient incentives for cable operators to add new programming. In addition, the rules create biases in favor of certain types of program offerings and certain types of program services. In these comments, TCI proposes specific solutions to correct these problems, including:

- Eliminate the delay in external cost recovery by allowing operators to pass through all basic tier external cost increases, subject to refund liability, after 30 days notice;
- For tiers on which no complaint has been filed, or where the regulated rate has been established, limit complaints to rate increases;
- Clarify the status of a la carte offerings;
- Do not restrict the use of prevailing company pricing for measuring programming costs in affiliate transactions; and
- Adopt TCI's "competitive markup" (explained fully in these comments and the attached economic appendix) to create incentives for operators to add programming and to eliminate biases in the current markup scheme.

In addition to providing operators with incentives to add new regulated services, the Commission should simultaneously provide incentives to develop and deploy broadband, interactive, unregulated offerings. Without such incentives, the emergence of the National Information Infrastructure ("NII") will be substantially delayed. Thus, the Commission should accelerate its efforts to clarify the abbreviated cost-of-service procedures through which it has said the costs of "significant upgrades" may be recovered.

COMMERCIAL RATES

The plain language of the 1992 Cable Act and its legislative history indicate that rate regulation was intended to apply to households, not commercial establishments. Indeed, the legislative history demonstrates that Congress did not even consider commercial rates. This is made especially clear by the fact that the GAO studies on which Congress predicated its decision to regulate cable rates did not include commercial rate data in their analyses. Similarly, the Commission's rate survey on which the benchmark scheme is based did not solicit information about commercial rates. For these reasons, TCI respectfully submits that the regulation of commercial cable rates is beyond the scope of the Commission's authority.

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In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation Fifth Notice of Proposed Rulemaking	)	MM Docket No. 92-266

COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") hereby files its comments on the Commission's Fifth Notice of Proposed Rulemaking ("Fifth NPRM") in the above-captioned proceeding.[1]

I. PROBLEMS WITH THE COMMISSION'S GOING-FORWARD METHODOLOGY

A. Introduction

As a general matter, TCI believes that the Commission's regulations should be neutral with regard to decisions about adding programming. The regulations should not encourage operators to add programming on an <u>a la carte</u> basis as opposed to a regulated tier. In addition, the regulations should not favor high cost services over low cost services. Such decisions should

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[1] <u>Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking</u>, MM Docket No. 92-266, FCC 94-38, released March 30, 1994 ("<u>Second Rate Reconsideration Order</u>" or "<u>Fifth NPRM</u>").

be driven by marketplace considerations, e.g., the needs and desires of customers. As shown below, the current regulations contain a number of biases in favor of particular service offerings, or particular types of programming. In the sections below, TCI proposes specific solutions to eliminate these bias problems.

In particular, TCI proposes a "competitive markup" which would permit regulated rates to increase up to $.25 over and above any additional programming costs when a new channel is added to a regulated tier. The competitive markup is derived from rigorous economic analyses undertaken by Drs. Stanley M. Besen and John R. Woodbury of Charles River Associates[2] and is fully explained in the text below and in the accompanying economic appendix. In addition to providing operators with incentives to add new services to regulated tiers, TCI's proposed markup scheme includes the following benefits:

- Since it is based on the competitive differential established by the Commission, the competitive markup is consistent with the Commission's revised benchmark approach;
- By establishing the markup on a per-service basis, rather than as a percentage of operator programming costs, TCI's approach eliminates the bias in favor of high-price services that is inherent in the Commission's proposal;
- Since additional revenues, such as launch incentives and advertising revenues, are already accounted for in the competitive markup, this

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[2] Stanley M. Besen and John R. Woodbury, "A Competitive Markup Approach to Establishing Rates When Adding Cable Program Services," Charles River Associates, June 29, 1994 ("Besen and Woodbury").

approach will allow the Commission to avoid the need to address the myriad complex questions of revenue "offsets" to rate increases; and

- Since the competitive markup includes <u>all</u> costs associated with adding a new channel net of estimated operator programming costs, it represents a much simpler and more efficient approach in that it replaces <u>both</u> the Commission's proposed 7.5% markup <u>and</u> the non-programming cost increment contained in "Table A."

TCI discusses four additional problems with the Commission's going forward rules: (1) the delay in external cost recovery caused by the Commission's pass-through rules; (2) the scope of review triggered by cable programming services rate complaints; (3) the regulatory status of <u>a la carte</u> packages; and (4) the valuation of programming costs in affiliate transactions. It is important to emphasize that, irrespective of the markup scheme the Commission adopts, these four problems will create profound disincentives for operators to add new regulated services. Accordingly, TCI urges the Commission to review its "going-forward" methodology broadly to ensure that cable operators have sufficient, but market-driven incentives to add new program services.

Finally, while TCI's proposed solutions to the "going-forward" problems will create incentives to add new <u>regulated</u> offerings, the Commission must be equally mindful of the need to give operators incentives to develop and deploy broadband, interactive, <u>unregulated</u> offerings. If operators know they can recover their costs and a reasonable markup by adding regulated services in the short-term, but are presented with no corresponding incentive to simultaneously or alternatively upgrade their cable plants to offer advanced, unregulated offerings, the emergence of the National Information Infrastructure ("NII") will be substantially delayed, contrary to overriding Commission, congressional, and Administration policy objectives. To avoid an inadvertent derailment of the NII, the Commission should accelerate its efforts to clarify the abbreviated cost-of-service procedures through which it has said costs of "significant upgrades" may be recovered.[3]

B. Specific Problems and Proposed Solutions

1. The Delay in External Cost Recovery Caused by the Commission's Rules Creates Substantial Disincentives to Add New Regulated Programming

a. Nature of the Problem

A significant problem with the FCC's price-cap/going-forward methodology is that under the calendar quarter system of external cost filings operators must incur significant expenses with no certainty as to when, if ever, those expenses may be recovered. The Commission's regulations prevent an operator from passing through increases in programming costs until, at the earliest, the beginning of the quarter following the quarter when the cost increase was "incurred."[4] Consequently, operators will not be able to coordinate increases in programming costs with rate adjustments. In the case of a new program service, subscribers

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3 See Cost-of-Service Order at ¶ 287.

4 Second Rate Reconsideration Order at ¶ 176.

could be billed several months after the service is launched and the operator has made substantial payments to the programmer.[5]

The disconnect between increases in programming costs and corresponding rate increases will be most pronounced with respect to basic-tier programming. A cable system whose basic-tier is regulated must obtain approval from the local franchising authority before increasing its basic-tier rates. The franchising authority has 30 days to rule on the operator's proposed rate increase but may extend its deliberations for an additional 90 days for a benchmark filing or an additional 150 days for a cost-of-service filing.[6]

Thus, an operator could be delayed seven months or more from passing through a programming cost increase or the cost of a new launch on the basic tier (i.e., the cost is incurred at the beginning of a calendar quarter; the operator cannot file for the increase until the beginning of the next quarter; 30 days for franchising authority decision, plus an optional 90-day tolling

[5] Similarly, as United Video points out, if the program service is ultimately dropped, subscribers will be forced to pay for that service beyond the time when it is actually available, and those who subscribe to cable between the time the service is dropped and the corresponding rate decrease is implemented will be further penalized since they will have to pay for a service they never received. United Video Petition for Reconsideration, filed in MM Docket No. 92-266, May 16, 1994 ("United Video Petition") at 3.

[6] If the franchising authority does not issue a decision by the end of this period, the proposed rate increase will go into effect automatically. Alternatively, the franchising authority may issue an accounting order allowing the rate increase to go into effect, subject to the operator's obligation to issue refunds if the rate is ultimately found to be unreasonable. 47 C.F.R. § 76.933(c).

period). This scenario assumes that the Commission's rules allow the operator to notify subscribers of the rate increase _during_ the franchising authority's deliberations. The Commission has not yet addressed this issue. If concurrent subscriber notification is prohibited, the pass throughs of programming cost increases will be delayed still further.[7] Besides inviting such prolonged delays in cost recovery, this pass through scheme will likely produce an administrative nightmare, since operators may be forced to file overlapping Forms 1210 to comply with the Commission's rules.[8]

In the end, the protracted delays and administrative hurdles created by the Commission's basic-tier pass through scheme will substantially discourage operators from adding new regulated programming to the basic tier. This is true not only because the increased basic-tier programming costs incurred by the operator during the franchising authority's deliberations will never be recovered, but also because the operator faces the distinct

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[7] This delay will be longer still if the franchising authority's rate determination includes a determination by the franchising authority of the regulatory status of the operator's _a la carte_ packages.

[8] For example, the rules require operators to adjust their rates in the next calendar quarter for any _decrease_ in programming costs that results from the deletion of a channel or channels from a regulated tier. 47 C.F.R. § 76.922(d)(3)(ii). When combined with a prior-approval requirement for pass throughs, this "deletion rule" ensures the filing of overlapping 1210s which will serve only to further complicate the Commission's rate regulatory scheme.

possibility that a basic-tier pass through may ultimately be rejected, or reduced, by the franchising authority.[9]

Finally, the Commission's interpretation of when cable operators may consider external costs to be "incurred"[10] may further delay operator recovery of legitimate programming cost increases. On June 14, 1994, the Commission clarified that external costs may be claimed on Form 1210 provided the "increased external cost was recognized on the books of the operating company during the previous period," i.e., as long as the expenses were either actually paid or accrued during that period.[11] This clarification is a commendable attempt by the Commission to reduce the delay in external cost recovery. However, so long as the delays caused by the consumer notification regulations discussed above remain, biases against adding new programming to a basic tier will remain.

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[9] By contrast, an operator does not need prior approval to increase its rates for cable programming services ("CPS") unless the Commission has found the operator's CPS rates to be unreasonable in the last 12 months. See "Questions and Answers on Cable Television Rate Regulation," Mimeo 43096, May 18, 1994, at A2.

[10] The instructions for Module B of Form 1210 direct operators to include changes in external costs that have been "incurred."

[11] "Questions and Answers on Cable Television Rate Regulation," Released June 14, 1994, Questions 3 and 4.

b. Proposed Solutions

1) After 30-Days Notice, Allow Operators to Pass Through All Basic-Tier External Cost Increases, Subject to Refund Liability

The Commission should revise its rules to allow regulated cable systems to pass through basic-tier external cost increases 30 days after notifying the franchising authority and subscribers. Under this approach, a regulated operator would be required to file the appropriate rate justification form with the franchising authority 30 days prior to increasing its rates. Moreover the operator should be allowed to include, in its filing, all external cost increases <u>for which the operator has an accompanying legal obligation to pay the programmer</u>, even if the costs have not yet actually been paid or accrued.[12] If the franchising authority completes its review of the rate justification form within this "30-day window" and finds the proposed rate increase unreasonable, it may prevent, or reduce, the increase. Otherwise, the new basic-tier rate would go into effect. Thereafter, if, within the time frames established in 47 C.F.R. §§ 76.933(b) and (c), the franchising authority finds the

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[12] In addition, an operator should be permitted to provide notice of a price increase prior to when the costs are incurred, so long as the operator has a legal obligation to pay the costs on a date certain. It is common, for example, in long term contracts, that an operator knows in advance when its costs will increase. In such a situation, there is no need to impose on the operator the delay that would result by requiring the notice only after the costs are incurred.

increase (or a portion of the increase) unreasonable, it may order refunds.[13]

This revised approach has several advantages. First, it removes a bias that creates artificial operator incentives to prefer one regulated tier over another.

Second, this approach removes the asymmetric treatment of operators and subscribers. Under the Commission's approach, subscribers are guaranteed, through the prior-approval process, of never having to face an unreasonable basic-tier rate increase, whereas operators are assured of nothing except sustained uncertainty and the possibility of prolonged delays in recovery of legitimate external costs. By contrast, TCI's proposal maintains the protection of subscribers through the "30-day window" provision and the possibility of refunds. At the same time, this scheme ensures that operator recovery of legitimate external cost increases is unimpeded by artificial regulatory constraints.

Finally, this approach comports more closely with the intent of the 1992 Cable Act and prior Commission findings than do the existing rules. The Act requires 30-days advance notice to the franchising authority of any basic-tier rate increase. Nothing in the Act, however, requires that the franchising authority approve a proposed rate increase before it is implemented. In fact, in its Rate Order, the Commission adopted this very

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13 See Comments of Programming Providers on Second Rate Reconsideration Order and 5th NPRM, filed in MM Docket No. 92-266, May 16, 1994, at 19 ("Programming Providers").

interpretation with respect to the automatic pass through of increases in external costs:

> [C]ertain price changes beyond an operator's control can automatically be passed through to subscribers in addition to the reasonable rate . . . . <u>Because such exogenous costs are presumed reasonable, review of these adjustments should not create an undue delay for the operator, and the franchising authority must pass on them within 30 days . . . .</u> In addition, even if a proposed increase exceeds the presumptively reasonable level, we will require franchising authorities to act on the portion of the increase that qualifies as an automatic adjustment within 30 days. <u>If the franchising authority does not act upon a request for such an adjustment within 30 days, it will go into effect automatically.</u>[14]

2) Eliminate the Requirement for Prior Approval of Increases in Cable Programming Services Rates

The Commission should also remove its rule requiring operators whose CPS rates have been found unreasonable in the last 12 months to obtain Commission approval before raising these rates.[15] First, such a requirement is at odds with express language in the 1992 Cable Act which dictates that regulation of CPS shall be implemented on a complaint-driven, rather than a prior-approval basis. For example, Section 3(c)(1)(C) of the Act directs the Commission to establish:

> the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by

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[14] <u>Rate Order</u>, 8 FCC Rcd. 5631 at ¶ 133 and n.355 (1993) (footnotes omitted) (emphasis added) ("Rate Order").

[15] <u>See</u> FCC Form 1210, May 1994, at 2.

> subscribers after the filing of such complaint and that are determined to be unreasonable.[16]

Second, a prior approval requirement in the CPS context would create the very same disincentives to add new CPS programming, or to negotiate for programming cost increases for existing CPS offerings, that were described above with respect to basic-tier services. TCI's proposal would remove that bias.

Third, a prior-approval requirement for CPS will invite even more uncertainty and the potential for even greater delays than that experienced at the local level with respect to the basic tier. This is because the Commission's rules provide no specific time frames for Commission review of proposed CPS rate increases.[17]

Finally, a prior-approval requirement is wholly unwarranted in the CPS context, since the Commission's determination to impose no time limit on refund liability for unreasonable CPS rates[18] provides more than sufficient assurance that subscribers will be protected from unreasonable CPS rate increases.[19]

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[16] 1992 Cable Act § 3(c)(1)(C) (emphasis added). See also id. § 3(c)(1)(C)(3).

[17] See 47 C.F.R. § 76.957.

[18] See Third Rate Reconsideration Order, 74 R.R.2d (P&F) 1274 at ¶ 114.

[19] However, because such an indefinite period will itself create disincentives, TCI suggests that the Commission reconsider its decision and impose some time limit for CPS refund liability.

2. Allowing Upper-Tier Complaints to Extend Beyond the Rate Increase to the Operator's Underlying Rate Structure Creates Substantial Disincentives to Add New Regulated Programming

a. Nature of the Problem

The Commission has ruled that, on a going-forward basis, any changes in CPS rates will subject an operator to complaints against its entire CPS rate structure, not just the portion of the CPS rate attributable to the rate increase.[20] The indefinite extension of parties' ability to challenge the operator's CPS rate structure is fundamentally at odds with Congress' vision of a complaint-driven CPS regulatory regime under which parties have a limited period of time in which to challenge a CPS rate change.[21] The Act specifically limits complaints concerning existing rates to the 180 day period following the effective date of the Commission's regulations.[22] That period has lapsed. If no complaint was filed prior to that time, then the rates must be presumed reasonable. There would have been no reason for Congress to enact a cut-off date if it intended to leave open the question of reasonableness of existing rates after that date. Thus, where no complaint has been filed, if an operator increases its rate after the cut-off date, any

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[20] Rate Order at ¶ 375 and n.907.

[21] See, e.g., Programming Providers at 14-15 (citing legislative history and sections of the act which clearly demonstrate congressional intent for a limited window for the filing of CPS rate complaints, as well as Commission rules implementing this statutory directive). See also Public Interest Petitioners at 13.

[22] Section 623(c)(3); 47 U.S.C. § 543(c)(3).

inquiry must be limited to whether the <u>increase</u> was properly done because the underlying rate is presumed reasonable.

Similarly, if a complaint was filed before the cut-off date and the rates are found to be reasonable under the regulations, or if the rates are found unreasonable and are appropriately adjusted, any subsequent complaints may address only subsequent rate increases. If such subsequent rate increases are found improper, the operator has refund liability on the increase, but not the underlying rate. Any other interpretation creates an extraordinary disincentive for operators to add new channels to CPS tiers, since by doing so the operator may trigger the prospective reduction of its CPS tier rate.[23]

b. Proposed Solution: Limit Complaints to Rate <u>Increases</u>

The Commission should revise its rules to limit the review of a CPS complaint to the amount of the <u>increase</u> in the CPS rate, rather than the reasonableness of the operator's <u>entire</u> CPS rate structure.

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[23] <u>See</u> Programming Providers at 13-16; Petition for Reconsideration of Public Interest Petitioners, filed May 16, 1994, at 12 ("Public Interest Petitioners"); United Video Petition at 9.

3. The Rules Governing Collective A La Carte Offerings and the Ability of Franchising Authorities to Determine the Regulatory Status of These Offerings Create Substantial Disincentives to Add New Programming

a. Nature of the Problem

The current uncertainty surrounding the Commission's a la carte rules diminishes the ability of operators to offer a la carte services and legitimate collective offerings of a la carte services at a discounted rate.

b. Proposed Solution

The Commission should reiterate that the offering of services on a stand alone a la carte basis is permitted as long as the services are offered to subscribers on a positive option basis. This approach should apply to services currently offered by the cable operator, as well as new services. Where a la carte services are offered on a positive option basis, the Commission's rules do not apply and no inquiry would be appropriate by the Commission, the franchising authority, or any other governmental body.

Of course, operators must have the necessary contractual rights to offer the services on a stand alone a la carte basis. However, the Commission should make clear that nothing in its regulations limit any rights an operator may have obtained contractually to offer services a la carte. In short, on the issue of offering services on a stand alone a la carte basis, the contract between the operator and the programmer should be dispositive.

With regard to collective a la carte offerings, the Commission has said that "the public interest will be served by generally permitting nonregulated treatment of collective offerings of a la carte channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation."[24] TCI agrees that consumers would be benefitted by the availability of a group of a la carte services at a discounted rate. Where collective a la carte services are offered, the Commission may inquire whether the offering in fact enhanced consumer choice or, in effect, provided no choice and should be considered a tier subject to regulation.

Finally, the Commission improperly and unnecessarily extended jurisdiction over a la carte offerings to franchise authorities. Concurrent jurisdiction in this area is prohibited by the Act since collective a la carte offerings, if ultimately found to be regulated, would be tiers, and the 1992 Cable Act confers exclusive jurisdiction over CPS tiers to the Commission.[25]

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[24] Second Rate Reconsideration Order at ¶ 194. See also Rate Order at ¶ 327 (providing for unregulated treatment of collective offerings of a la carte channels affords operators an opportunity to enhance consumer choice by making programming more affordable and more widely available).

[25] 47 U.S.C. § 543(c). See also Rate Order at ¶ 350 ("[A]bsent specific authority to delegate our adjudicatory and enforcement powers we are unable to delegate such powers to the local franchising authorities in the cable programming context"); Programming Providers at 23 ("When Congress delegates to an agency jurisdiction over the implementation of a law, the agency may not, in turn, delegate that jurisdiction to another entity in the absence of express statutory authority to do so") (citing, inter alia, Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712

Moreover, local jurisdiction would create substantial uncertainty as thousands of franchise authorities rule on collective a la carte offerings. Such uncertainty is wholly unnecessary. A franchise authority's appropriate role in this area is to count the number of channels in the regulated tier for purposes of setting initial rates. In that context, the franchise authority may challenge any collective a la carte offering by an operator. The Commission would then determine whether the collective a la carte offering constituted a tier. If it did, the normal procedures would be followed to establish the reasonableness of the rate. If not, the a la carte offering would be unregulated and the inquiry would be at an end. This approach is far more efficient, thus preserving the resources of the Commission, franchise authorities and cable operators. It is far more certain and therefore does not create a bias against the creation of legitimate, pro-consumer collective a la carte offerings. Finally, it fully protects consumers because franchise authorities have the ability to challenge the regulatory status of collective a la carte offerings.

F.2d 650, 663 (D.C. Cir. 1983)).

4. The Commission's Proposal to Limit Prevailing Company Pricing for Affiliate Transactions by Its 75% Test Will Further Discourage the Addition of New Regulated Programming

a. Nature of the Problem

The Commission has said that the valuation of programming costs for programming obtained from affiliated programmers will be governed by its affiliate transaction rules adopted in the cost-of-service proceeding.[26] The Commission's interim affiliate transaction rules allow "prevailing company pricing" where the seller has sold the same kind of asset or service to a "substantial number" of third parties.[27] However, the Commission has proposed to allow "prevailing company pricing only for affiliate transactions in which the non-cable affiliate sells at least 75 percent of its output to non-affiliates" ("75% rule").[28]

As demonstrated in the following section and in the attached economic appendix, the Commission's interim affiliate transaction rules are more than adequate because fair market tests exist for all substantial transactions between cable systems and their affiliates. Even assuming, however, that there were legitimate concerns with prevailing company pricing, the proposed 75% rule is unworkable. This is especially true given the fact that under

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26 Second Rate Reconsideration at n.347.

27 Cost-of-Service Order, 74 R.R.2d (P&F) 1149, ¶ 267 (1994) ("Cost-of-Service Order").

28 Cost-of-Service Further NPRM, 74 R.R.2d (P&F) 1149, ¶ 311 (1994) ("Cost-of-Service Further NPRM").

the proposed rule a programmer's output is calculated on a cumulative basis, i.e., if more than 25% of a programmer's output is taken by all its affiliates combined, the rule would be triggered.[29] Thus, in some cases TCI by itself, and almost certainly if any other large MSO is affiliated with the programmer, could trigger the 75% rule.

High quality programming is an expensive and risky proposition. Historically, operator investment, including investment by several cable operators in the same program services, has been an important source of funding for programmers. It is well-documented that MSOs, including TCI, have been the principal financiers for cable programmers.[30] For example, the founders of Black Entertainment Television and The Discovery Channel both have, on numerous occasions, described the difficulties they encountered in obtaining funding for their infant, and financially struggling, services. After they had been repeatedly turned down by other investment sources, cable operators provided financing that ensured the continued survival of these services and made possible their current success. The 75% rule could severely discourage the type of efficient operator investments that have generated much quality programming and which will continue to enhance the viability of new services.

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[29] Id.

[30] See Statement of Dr. John C. Malone, President and Chief Executive Officer of Tele-Communications, Inc. Before the Senate Subcommittee on Antitrust, Monopolies & Business Rights (December 16, 1993).

b. Proposed Solution: Do Not Restrict the Use of Prevailing Company Pricing for Measuring Programming Costs in Affiliate Transactions

The Commission should not adopt the proposed 75% rule.[31] The interim affiliate transaction rules, which allow prevailing company pricing where the seller has sold the same kind of asset or service to a "substantial number" of third parties, are more than adequate because fair market tests exist for all substantial transactions. The record in the cost-of-service proceeding demonstrates that "affiliate transactions in the cable industry primarily involve purchases from affiliated programmers who sell the same products to third parties."[32] Thus, prevailing company pricing is a reliable measure of fair market value for transactions that occur between cable affiliates.

In addition, as Besen and Woodbury argue in the attached paper:

> So long as the program service undertakes a substantial amount of transactions with unaffiliated operators, and the prices for these transactions are applied to transactions with affiliates, the incentives for the type of behavior that concerns the Commission will be substantially attenuated. The reason is, of course, that if prices are raised by a program service to evade rate regulation, the service would sacrifice profits on its sales to unaffiliated cable operators because it would have to charge them the same excessive prices.[33]

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[31] In its Comments on the Cost-of-Service Further NPRM, TCI will present a more comprehensive analysis of the interim affiliate transaction rules and the Commission's proposed revisions.

[32] Cost-of-Service Order at ¶ 265 (footnote omitted).

[33] Besen and Woodbury at 16-17.